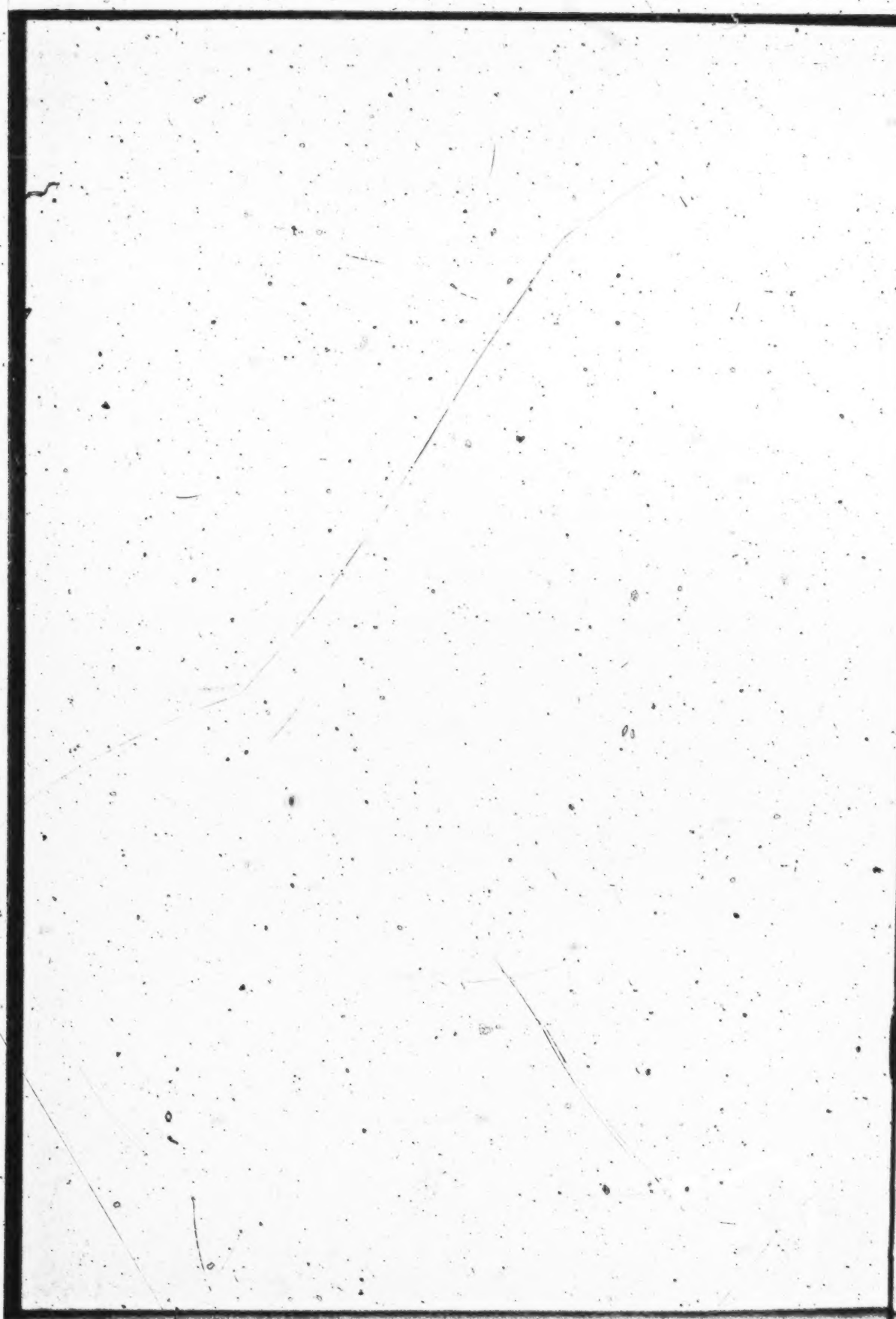

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No. 760

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

UNITED STATES OF AMERICA,
Appellant,

v.

PENN-OLIN CHEMICAL COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

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December 30, 1966

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UNITED STATES OF AMERICA, *Appellant,* v. PENN-OLIN CHEMICAL COMPANY, et al., *Appellees.*	No. 760

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Appellees move, pursuant to Rule 16(1)(c) of the Revised Rules of this Court, that the judgment of the district court on remand be affirmed. That judgment was entered on November 2, 1965 (p. 39a).[1] Appellant filed its jurisdictional statement a year later, on November 8, 1966. On November 25, 1966, Mr. Justice Brennan extended to January 3, 1967, the time for appellees to file this motion.

The judgment on remand dismissing the complaint should be affirmed because the trial court applied to the facts in this case the standard enunciated by this Court in its original decision herein, 378 U. S. 158, and there is no substantial question requiring further argument.

[1]Unless otherwise indicated, all page references are to appellant's second jurisdictional statement and the opinion and judgment on remand printed as appendices thereto. Citations to the record on the first appeal are prefaced by "R.", those to the transcript of the trial on remand by "Tr.", and those to appellant's comments on defendants' proposed findings of fact on remand by "CDFR".

Question Presented

Appellant states the following question:

> "Whether the district court's finding that neither of two joint venturers would have entered the relevant market independently was based on an erroneous standard and was inconsistent with the decision of this Court remanding the case for further proceedings."

Statement of the Case

On remand the district court found that it had not been shown as a reasonable probability that, in the absence of a joint venture, either Pennsalt or Olin on its own would have built a sodium chlorate plant in the southeastern market. In asking this Court to note jurisdiction for the second time appellant in its question presented and argument asserts that the district court's finding was based on an erroneous standard and was inconsistent with this Court's previous decision (pp. 2, 18-20):

In fact, the district court applied the standard set forth by this Court in its earlier opinion, and appellant's jurisdictional statement shows only that appellant's view of the evidence differs from that reflected in the district court's careful and extensive review of the record of both trials.

At the first trial appellant contended that, if both companies would or could have entered the market, a joint venture between them was necessarily unlawful. Appellant did not attempt to show what would have been the significance of one company as a potential competitor if the other company had actually entered the relevant market. 217 F. Supp. at 123-24, 130-31 and n. 25. Indeed, the first time appellant espoused the theory of entry by one company while the other remained a potential competitor was in its

jurisdictional statement on its first appeal to this Court (at p. 18).

In its first opinion the district court rejected the contention that a joint venture between companies which "could" have entered was necessarily unlawful, and found that both companies probably would not have entered independently. Therefore, and because there was no showing that the formation of Penn-Olin resulted in less competition than would have prevailed if only one joint venturer had entered, the court found no need to determine whether as a matter of reasonable probability either company would have entered alone. 217 F. Supp. at 130.

On appeal, this Court left undisturbed the finding that both companies would not have built plants in the southeast, but it remanded the case for a finding "as to the reasonable probability that either one of the corporations would have entered . . . while the other would have remained a significant potential competitor" and for an assessment of "the probability of a substantial lessening of competition." Recognizing that the trial court might have concluded that there was no evidence on these issues, this Court authorized opening the record for further testimony. 378 U. S. at 175-77.

On remand, three issues were formulated by the trial judge and the parties: Was it reasonably probable (1) that either company would have entered; (2) that, if so, the other would have remained a significant potential competitor; and (3) that, if so, Penn-Olin resulted in substantially less competition than would have existed if one company had entered while the other continued to be interested in entry? (pp. 3a-4a).[2]

[2]In the court below appellant contended that the third issue was beyond the scope of the remand and that evidence directed to it was irrelevant (p. 4a), but in its jurisdictional statement appellant now concedes the pertinence of this issue (p. 22 n. 19).

Appellant did not introduce any evidence at the second trial. But appellees introduced further evidence negativing the probability of independent entry and evidence which showed that both before and after Penn-Olin was formed in 1960 there were some ten major chemical companies other than Pennsalt and Olin which considered, and had ample financial resources to embark on, the production of sodium chlorate in the southeast,[3] and that those companies were regarded as possible entrants by those already in the market (Tr. 222-25, 591, 793, 871).

Appellees' uncontroverted evidence further established that starting in 1959 some pulp and paper companies located in various parts of the United States and Canada had embarked on their own production of the sodium chlorate which they use in their operations (Tr. 110, 176, 353-54); that engineering companies and foreign owners of sodium chlorate technology were actively promoting captive plants (Tr. 340-45, 509, 527-44); that many pulp and paper companies located in the southeast, some as early as 1960, had been considering installation of their own sodium chlorate production facilities (Tr. 340-42, 417-27, 528-35, 566-67, 828-31); and that admittedly as a consequence there had been a substantial reduction in the price of sodium chlorate (CDFR 7.4; Tr. 794-95). Appellees also demonstrated that by 1960 the total demand for sodium chlorate had leveled off after the expansion of the '50's and that the only new demand was coming from the normal, gradual increase in demand for paper (Tr. 243, 810).

Expert economic testimony adduced by appellees showed that the removal of one chemical company from the ranks of

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[3] Allied Chemical, American Cyanamid, Diamond Alkali, Dow, FMC, Jefferson, Monsanto, PPG, Stauffer, Virginia Chemicals, Wyandotte.

potential competitors would not diminish the market impact of the potential competition provided by the many chemical companies and the pulp and paper companies recognized by those in the market as possible producers (Tr. 935-36). Appellant did not adduce any evidence to the contrary, and indeed in its opening argument recognized the economic basis for that analysis:

> "MR. FREED: . . . [I]f the remaining parent of Penn-Olin . . . were simply sitting in a great big nest of potential entrants, . . . then I think the Court might not be able to find that there was anything unusual about the characteristic of the potential competitor left in the wake of having no joint venture." (Tr. 53).

In its opinion after remand, the district court found that appellant had not shown as a reasonable probability that, in the absence of Penn-Olin, either Pennsalt or Olin would have entered (pp. 23a-24a, 37a). Since the parties had agreed that "if the Court finds that plaintiff has not sustained its burden of proof on this issue the complaint must be dismissed" (Pretrial Order No. 1 After Remand, p. 3), the court found it unnecessary to decide the other two issues (pp. 37a-38a).[4]

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[4]Appellant's stated purpose to ask this Court also to decide those two issues (p. 22 n. 19) is extraordinary. Appellant concedes that if this Court should reverse the district court on the probability-of-entry issue, normal practice would be to remand to the district court for consideration of the two remaining issues. Notwithstanding, appellant urges this Court to function as a trier of the facts. Appellees submit that this is precisely the type of case where the fact-finding should be left to the trial court. Not only is there a voluminous record of two trials, but the undecided issues in large measure rest on the evaluation of live testimony of many witnesses and of factual detail which can most appropriately be done by the trial judge.

Argument

The two contentions reflected in appellant's statement of the question presented—that the district court applied an erroneous standard in determining the probability of independent entry and that its decision is inconsistent with the prior decision of this Court—are directly contrary to what appellant has elsewhere said about the district court's opinion on remand. In *United States* v. *Crocker-Anglo Nat'l Bank,* Civil Action No. 41808, N. D. Cal., appellant described the *Penn-Olin* district court opinion on remand as follows:

> "... That opinion, however, turned entirely on its own particular factual situation and in no way presumed to alter the basic legal principles on potential competition enunciated by the Supreme Court in its opinion in the case (378 U. S. 158 (1964)). The trial court's opinion on remand, indeed, confines itself to a discussion of the facts there involved, and does not even discuss the law." Plaintiff's Post-Trial Reply Brief, Dec. 23, 1965, p. 18.

The district court's opinion in this case does indeed turn on "its own particular factual situation" and is consistent with "the basic legal principles" enunciated in this Court's earlier opinion in this case. The decision below does not, as appellant now asserts, apply "a standard of 'subjective' intent which would require the government to prove in such cases that management had actually formed a final and definite intention to enter a market area" (p. 13).

The trial court carefully analyzed all the evidence at both trials concerning the possibility of entry by each company in the face of such market facts as the leveling off of demand for sodium chlorate, the threat of captive sodium chlorate production by the pulp and paper companies themselves, and the resulting substantial drop in the price of

sodium chlorate in the southeast (pp. 3a, 23a). The evidence showed that other potential entrants considered the same factors, for there was in fact a "nest" of potential merchant and captive producers (p. 5, *supra*), with the potential captive producers causing greater concern to existing producers than potential merchant competition (Tr. 140-41).[5]

The court's findings on remand that there had been no showing that either joint venturer would as a reasonable probability have entered are supported by substantial and reliable evidence. In deciding that Pennsalt would not have entered on its own, the trial court considered, among other things, the following facts: (1) since at least December 1956 Pennsalt's investment policy for new construction required a minimum before tax return of 25% for stable products whose growth was accurately predictable and a higher return for products such as ammonium perchlorate used largely by only one consuming group (pp. 24a-25a, 30a n. 24); (2) Pennsalt's history, up to 1959, of earning a lower net return on shareholders' equity than the average of comparable chemical companies caused it to adhere strictly to its investment policy with the result that, by 1964, that return had been substantially increased (p. 30a);[6] (3) because projected returns on a plant to manu-

[5]Appellant described the interest of the other chemical companies as "desultory—sodium chlorate was being considered as they would any number of products" (Post-trial (On Remand) Brief of the United States, p. 9). Yet the evidence relied upon by appellant to establish the probabilities of entry by Pennsalt and Olin—optimistic statements by divisional employees, researchers, etc.—is no stronger than the evidence of those companies' interest in sodium chlorate, which evidence appellant claimed did not establish them as significant potential competitors (*id.* at pp. 4, 8, 9; *e.g.*, CDFR 20.0, 22.1).

[6]This improvement in return on shareholders' equity was also aided by stressing projects involving chemical intermediates and specialties, which are generally more profitable than bulk commodities such as sodium chlorate. Bulk commodities accounted for 46.9% of Pennsalt's sales in 1957 but only 28.4% in 1964. (DX 53, DX 54, DX 55; Tr. 718-22)

facture sodium chlorate alone were far below its investment standards, Pennsalt on December 5, 1957, decided it was unlikely that it would ever construct such a plant in the southeast and thereafter, as appellant admits (p. 6), Pennsalt considered only a combination plant to produce sodium chlorate and ammonium perchlorate (a product which, in 1958, showed promise of being highly profitable) (pp. 26a, 33a); and (4) despite some estimates in late 1958 and early 1959 that it might be profitable, Pennsalt lost interest in even a combination chlorate-perchlorate plant because of uncertainty about the future demand for perchlorate, realization that the perchlorate cost estimates were probably optimistic, and the drop in the market price of perchlorate from 38 cents per pound, on which its estimates had been based, to 32 cents per pound (pp. 27a-36a).

The district court's fully documented conclusion that the Pennsalt chlorate-perchlorate operation never went forward because perchlorate, the only justification for such a project, had an uncertain future is in sharp contrast to appellant's contentions concerning the reasons for Pennsalt's decision (pp. 5-7). That its loss of interest in the combination chlorate-perchlorate plant was a realistic assessment of the situation is borne out by subsequent developments: in August 1960 the Assistant Secretary of Defense advised Pennsalt that for the next two or three years there would be a substantial excess of capacity in perchlorate (p. 37a); the joint venture itself went only into chlorate (p. 36a); by 1964 perchlorate demand had declined radically; and by early 1965 total capacity was more than double the demand, Pennsalt had shut down its only perchlorate plant (in Portland, Oregon), and Hooker had shut down its plant in the southeast. These perchlorate developments have been admitted by appellant (CDFR 9.1-9.4).

As to Olin, the trial court considered that: (1) the prediction of profitability by Olin's Chemical Division was not necessarily accurate, and, more importantly, was mistrusted at the corporate management level where decisions on the competing capital investment requests of Olin's seven divisions were made;[7] (2) moreover, the amount of projected earnings considered acceptable for various projects by the Chemical Division was not acceptable to corporate management (pp. 5a, 20a-21a); (3) Olin as an independent entrant would have had to use the Vickers-Krebs process, which was inferior to Pennsalt's, as evidenced by the fact that Penn-Olin rejected the Vickers-Krebs process in favor of the Pennsalt process (p. 19a); (4) considerations of this sort led Olin's management in April 1959 to reject the Chemical Division's recommendation that Olin independently enter the market, not, as appellant suggests, because of the joint venture (p. 7 n. 6), but because of doubts about the entire chlorine-chlorate project's technical adequacy and profitability (pp. 10a-11a); and (5) Olin's management all but abandoned the economically more favorable joint venture in the summer of 1960 because the projected return was still too low and market developments

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[7]The facts concerning the Chemical Division's optimism are also substantially overstated in the jurisdictional statement. For example, PX 22, R. 521-24, does not support the propositions for which it is cited (at pp. 7-8). It is a cost estimated on electrochemical production of sodium chlorate which rejects McIntosh, Alabama, as a logical location for a chlorate plant, but suggests Omal, Ohio. It also states, among other things:

> ". . . Even under [Hooker's] favorable conditions the return on the investment is sufficiently low to indicate that all of these major cost factors must be precisely evaluated in considering the attractiveness of a specific operation for the electrochemical production of sodium chlorate." (R. 523).

made the project unattractive; it approved the joint venture only after a revision of plant plans and profit estimates.[8]

The district court did not, as appellant asserts (p. 13), require appellant to prove a subjective intent of management to enter the sodium chlorate market. Rather, the court properly considered the substantial evidence of management's intent *not* to enter the market—evidence which was supported by objective facts and tested by cross-examination. Appellant's suggestion (p. 14) that such evidence is not "reliable" is wholly without support in the record.

The court below considered all the evidence at both trials (p. 3a). That evidence included the very types of evidence which appellant endorses: "evidence relating to the capabilities of the firms, the structure of the market, and the economic forces which govern those who are engaged in it" (p. 15). In essence, appellant is asking this Court to assume the trial courts' function of assessing the credibility of witnesses and weighing the evidence in order to make a purely factual determination as to the reasonable probability of independent entry by either Pennsalt or Olin.

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[8]Appellant argues that joint entry was not financially more attractive because Pennsalt and Olin could and did finance Penn-Olin themselves, without borrowed money (p. 20 n. 18). The fact is that Penn-Olin was expected to borrow capital in its own name, thereby not detracting from its parents' ability to borrow, but the pendency of this suit frustrated that plan (R. 140).

Conclusion

For the foregoing reasons, the decision of the district court should be affirmed.

December 30, 1966

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